No. 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF IN OPPOSITION

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March 8, 2010

QUESTIONS PRESENTED

1. Whether this Court should accept Norfolk Southern's invitation to use the case at bar as a vehicle to overturn *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957) (and every one of the federal circuits), and hold that FELA plaintiffs must prove, not the "relaxed" standard of causation acknowledged in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), but what Norfolk Southern calls "traditional" common law proximate cause, where (a) the jury instructions in the case at bar were, in substance, "traditional" common law proximate cause instructions; (b) at trial Norfolk Southern never contested the existence of causation if the jury found it negligent; and (c) the conflict among lower courts over *Rogers* that Norfolk Southern claims to see is not meaningful, and in any event does not require attention from this Court.

2. Whether this Court should accept Norfolk Southern's invitation to use the case at bar as a vehicle to examine cases reading *Rogers* as adopting a "relaxed" negligence standard, where (a) the jury instructions in the case at bar were "traditional" common law negligence instructions; and (b) Norfolk Southern failed to preserve its argument below.

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STATEMENT OF THE CASE

In railroad parlance, the space through which a train moves over a set of tracks is known, for obvious reasons, as the "red zone." 15 R. 627-29. The space outside the red zone is known, for equally-obvious reasons, as the "safety zone." *Id.* On a six-track stretch in South Memphis called Broadway, the safety zone is, according to stipulated measurements, no more than 28 and 5/8 inches, and may be as little as 25 and 1/8 inches. 18 R. 1072-74, 1080-81. Put another way, a man sitting in a Norfolk Southern locomotive on Broadway cannot stick his hand straight out the window if there is a locomotive on the adjacent Burlington Northern track—he must bend his elbow. 15 R. 651-52. These tracks were, presumably, wide enough when they were laid, over a century ago, when trains were narrower, but today they would be illegal under Tenn. Code Ann. § 65-6-205, save for the statute's grandfather clause, which allows them to be "maintained at such clearance as was lawful at the time of construction."

The safety zones on Broadway are so narrow that if Norfolk Southern directs an employee to work alongside a train stopped on Broadway, that employee will necessarily be working, at least in part, in Burlington Northern's red zone. As Norfolk Southern's attorney admitted to the Jury, "[t]here's no place you can stand without being, without filing [fouling—*i.e.*, entering the red zone of] the track, adjacent track[,] that's a fact." 16 R. 790.

Close clearances were not the only hazard on Broadway. Ordinarily a Norfolk Southern crewman

forced to work on the ground can count on being warned in advance, by radio, of trains approaching on the adjacent track. This was not so on Broadway, because the adjacent tracks were operated by different railroads that—despite the well-known dangers—never undertook steps to permit such communication. 15 R. 586-88; 17 R. 956-57; 17 R. 972; 21 R. 1623-24. Moreover, the lighting on Broadway was entirely inadequate. 17 R. 957; 15 R. 598; 17 R. 970.

Norfolk Southern employees, fearful of being struck by moving trains on adjacent tracks, complained. 17 R. 958-59; 18 R. 1100-02. Although Norfolk Southern attempted to suppress those complaints—after one Safety Committee meeting a supervisor requested that complaints about clearances be omitted from the minutes—it did admit that the area was "unsafe" (Norfolk Southern's term), and consequently forbade some on-ground work there. 16 R. 819-23 (re: minutes); 20 R. 1536-37 ("unsafe"); 17 R. 913-14 & Ex. 11 (no brake inspections allowed on Broadway); 20 R. 1536-37 & Ex. 101 (no hanging of End of Train devices allowed on Broadway); 15 R. 2023 (Norfolk Southern closing argument) (no brake tests on Broadway because "it'd be a whole lot safer" to do them elsewhere).[1]

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[1] One worker recalled working on the ground on Broadway when "a train eased up on me without me hearing it. And it was so close I had to squat down under the car in order to keep from getting hit." 17 R. 909 (emphasis supplied). Broadway was so dangerous that when a Norfolk Southern police officer refused to walk out there simply to close a container door, his boss, despite the obvious and immediate risk of pilferage, told him his refusal was justified. 21 R. 1573.

Norfolk Southern forbade some on-ground work at Broadway, but not all. Despite the fact that reasonable alternatives existed, Norfolk Southern ordered respondent Thomas David Jordan to Broadway, in the dark, 14 R. 548, where his job would require him to work at least partly in the red zone of the adjacent Burlington Northern track. As Norfolk Southern's attorney put it at trial, 25 R. 74, "of course, you have to fill [foul] the adjacent track, if you are going to pull the cut lever, which is part of what Mr. Jordan would have to do. . . ." Mr. Jordan never saw the Burlington Northern train that hit him, and left him with a career-ending, permanently-disabling roster of injuries that still give him pain daily.[2] He first learned about the accident from his wife, in the hospital, when he regained consciousness almost two weeks later. 18 R. 1110-11.

It was Mr. Jordan's theory of the case, not that the close clearances by themselves made Norfolk Southern liable, but that Norfolk Southern's failure to use due care in light of the close clearances, and other hazards, made Norfolk Southern liable.[3]

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[2] His injuries included three vertebrae fractures, 19 R. 1262, an open fracture of the left leg, 19 R. 1281, a fracture of the greater trochanter, 19 R. 1256, a fracture of the scapula, 19 R. 1276, severe head trauma, 19 R. 1314, an open gash to the upper right thigh, 19 R. 1256, and lacerations to the spine, hemothorax, and pneumothorax. 19 R. 1330.

[3] Norfolk Southern asserts that Mr. Jordan's "sole allegation as to Norfolk Southern" was that the tracks were too close together, Pet. 7, but in fact the FELA mandates a consideration of "the whole" of the railroad's conduct, which "may be greater

Norfolk Southern argued to the jury that Mr. Jordan — a thirty-year veteran whose former supervisor called him "a great employee" who "did a fine job, an excellent job," and whom Norfolk Southern selected to teach safety classes to other railroad workers, 21 R. 1599-1601, 1630 — was himself solely at fault.[4] According to Norfolk Southern's calculations, the Burlington Northern train was visible from the spot where Mr. Jordan was working for a full forty-three seconds before it hit him. 15 R. 2029-30. Under Norfolk Southern's theory of the case, Mr. Jordan, whose work at this point required him both to foul the Burlington Northern track and lean his head and upper body in between the cars of his own train, thus blocking his vision up and down the tracks, should have stopped working every few seconds to glance up and down the tracks; should have seen the Burlington Northern train approaching; and should have scrambled into the Norfolk Southern train's red zone. 15 R. 2030-39

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than the sum of its parts," *Union Pac. R.R. Co. v. Hadley*, 246 U.S. 330, 332 (1918) (Holmes, J.), and this FELA case was tried in conformity with that mandate. Mr. Jordan's Complaint alleged negligence generally, the evidence established a variety of inter-related acts of negligence, the instructions did not limit the jury to specific acts of negligence, and the form of the verdict asked simply "Was Defendant Norfolk Southern Railway Company negligent under the Court's instructions?"

[4] *See* Norfolk Southern's closing argument, 15 Tr. 2015 (Mr. Jordan "got careless one time"); *id.* at 2017 ("Norfolk Southern is not guilty of any negligence in this case"); *id.* at 2030-31 ("we claim that this accident . . . was caused solely by Mr. Jordan"); *id.* at 2031 (arguing that Mr. Jordan was negligent for having his back to the Burlington Northern train).

(Norfolk Southern closing argument) ("[I]f you're watching what you're doing you've got plenty of time to see traffic coming from other railroads. . . . Mr. Jordan wasn't even looking at a train, he had his back to the train. That's not due care, that's negligence. . . . if he had looked, he'd have seen this big old Burlington Northern Santa Fe train. . . He had 43 seconds from the time that train rounded that curve way back there, just past Mississippi Boulevard, to observe the train if he had looked").

Of particular note, Norfolk Southern did not argue in the trial court that its negligence, if any, was too remote to represent a legal cause and thus to support legal liability. While Mr. Jordan and Norfolk Southern each pointed at trial to the other as the cause of Mr. Jordan's injuries, Norfolk Southern neither argued nor presented evidence that if the jury found it negligent, the degree of its causation was less than traditional proximate cause. *See* 15 R. 2030-31 (Norfolk Southern closing argument) ("[W]e claim that this accident . . . was caused solely by Mr. Jordan"). The jury found that the cause alleged by Norfolk Southern—negligence on the part of Mr. Jordan—simply did not exist. In short, any difference between what Norfolk Southern calls "traditional common law proximate cause" and "relaxed" or "even the slightest" causation was simply never at issue at trial.

REASONS FOR DENYING THE WRIT

Although the question presented at the beginning of Norfolk Southern's petition is broad and nebulous, Pet. i, the body of the Petition presents two discrete questions, neither of which warrants this Court's reviewing the case at bar.

First, Norfolk Southern seeks review of the question whether the plaintiff in a FELA case "must prove that the defendant's negligence was the proximate cause of the plaintiff's injury, or instead need only show 'slightest causation.'" Pet. 9. This question is not presented by this case, because the trial court gave the jury, in substance, the very proximate cause instruction that Norfolk Southern seeks, and, in any event, causation was never seriously contested at trial. Moreover, Norfolk Southern's argument that the lower courts are "intractably divided" on the FELA causation standard does not support review. Although there is some disagreement on exactly what this Court meant in *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957), by the phrase "even the slightest," there is no conflict among the lower courts in practice: Norfolk Southern does not cite a single case in which the "relaxed" standard was rejected in favor of what Norfolk Southern calls "traditional common law proximate cause." Finally, Norfolk Southern is simply wrong on the merits. This Court's FELA decisions, pre and post *Rogers*, clearly manifest a "relaxed" causation standard.

Second, Norfolk Southern seeks review of the question whether a FELA plaintiff need "prove only

'slight' negligence" to prevail. Pet. 16. Again, there is no warrant for reviewing the case at bar. Norfolk Southern asserts that one instruction, by using the phrase "in the slightest," invited the jury to return a verdict against Norfolk Southern on proof of something less than traditional common law negligence, but in fact the instruction did not do so, and, in any event, Norfolk Southern failed to preserve the point.

I. THIS CASE PRESENTS AN INADEQUATE VEHICLE TO ADDRESS ANY CONFLICT AMONG THE LOWER COURTS REGARDING THE CAUSATION STANDARD IN FELA ACTIONS.

A. The Jury Instructions In Fact Required What Norfolk Southern Calls "Traditional" Common Law Proximate Cause.

Norfolk Southern asks this Court to grant certiorari to resolve a supposed conflict among the lower state and federal courts regarding the standard for proving causation in a FELA negligence action. Specifically, Norfolk Southern claims that some courts correctly insist that a FELA plaintiff prove "traditional, common-law" proximate causation, Pet. 10-12, while other courts, misled by *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957), require a plaintiff to prove only that the defendant's negligence was the "slightest" cause of the plaintiff's injury. Pet. 12-14.

Assuming *arguendo* that Norfolk Southern correctly describes the supposed conflict (*but see*

infra, at 17-22), this case presents an inadequate vehicle to address it. To begin with, the trial court's causation instruction was, in substance, a proximate cause instruction. Thus this Court's acceptance of Norfolk Southern's legal argument would not change the result below.

At trial Norfolk Southern requested what it calls a "traditional" common law proximate cause instruction, which would have told the jury that it could not return a verdict against Norfolk Southern without finding that its negligence "was a proximate cause of the plaintiff's injury":

> In order to find that it was a proximate cause, you must find that the injury was the natural and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury.

Pet. App. 72a. The trial court rejected the proposed instruction, not because of *Rogers,* but because the substance was adequately covered in the other instructions. *Id.* at 24a. Specifically, the causation instructions given by the trial court was as follows:

> A legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

Opp. App. 13a. The Court of Appeals agreed with the trial court that "the substance of these proposed instructions was covered in the trial court's instructions." Pet. App. 29a.

The Court of Appeals was correct. When the "lengthy and detailed" instructions (Pet. App. 25a) are read in full, as both jurors and judges are required to do, it is clear that the jury was told, again and again, that it could not rule for Mr. Jordan without finding "fault," which term was defined to include negligence and "legal cause," that is, "a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred." Pet. App. 25a-26a.

The Judge began by outlining the "theories and contentions of the parties." It was, he said, Mr. Jordan's "theory and contention" that "both defendants were at fault and that their combined fault was the legal cause of the accident," adding that each of the Defendants "denies . . . fault." Opp. App. 9a. The Judge then went on to give "instructions dealing with general principles of law that apply equally to all parties." *Id.* at 11a. The first thing he said in this section was that "the Plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: A. That the Defendants were at fault; [and] B. [damages]. The Defendants, as an affirmative defense, claim that Plaintiff was at fault." *Id.*

At this point, then, it was clear that Mr. Jordan could not recover against Norfolk Southern without proving "fault" on the part of Norfolk Southern. The Judge then zeroed in on "fault":

> Therefore, in deciding this case you must determine the fault, if any, of each of the parties. If you find that more than one of the parties are at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault. A party is at fault if you find by a preponderance of the evidence that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Id. at 12a.

"Fault," the Judge continued,

> has two parts: Negligence and *legal cause*. . . . The second part of fault is *legal cause*. A legal cause of an injury is *a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred*. . . . If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a legal cause of the injury or damage for which a claim was made, you have found that party to be at fault. As I said before the plaintiff has the burden to prove fault on behalf of the defendants. If the plaintiff fails to do so, you should find such defendant's fault to be zero.

Id. at 12a-14a (emphasis supplied). The instructions went on to mention the "fault" requirement again and again. *Id.* at 14a-16a.

In short, under the instructions given, the Jury could not return a verdict against Norfolk Southern without finding that Norfolk Southern was negligent, and that Mr. Jordan's accident was caused "in natural and continuous sequence" by that negligence. This language is identical to what Norfolk Southern calls "traditional common law" proximate cause, as confirmed by numerous cases[5]

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[5] *See, e.g., Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1043 n.4 (5th Cir. 1982) ("traditional common law proximate cause: the act or omission must be a cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred") (internal quotation marks omitted); *Humphreys v. Delcourt*, 2009 WL 5174245, at *6 (Tex. App.-Houston [1 Dist.] Dec. 31, 2009) ("'Proximate cause' when used with respect to the conduct of [Humphreys] means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred"); *Marzoll v. Marine Harvest US, Inc.*, 2009 WL 4456321, at *35 (D. Me. Nov. 29, 2009) ("Proximate cause requires that the unseaworthy condition is the cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the results complained of, and without which it would not have occurred") (internal quotation marks omitted); *Grimes v. Norfolk S. Ry. Co.*, 116 F.Supp. 2d 995, 1005-06 (N.D. Ind. 2000) (Indiana common law) ("a chain of circumstances which in natural and continuous sequence lead to the resulting injury") (internal quotation marks omitted); *Anderson By and Through Anderson/Couvillon v. Neb. Dept. of Social Services*, 538 N.W.2d 732, 738 (Neb. 1995) ("a natural and probable result of the negligence"); *Comeau v. Rupp*, 810 F.Supp. 1172, 1177 (D.Kan. 1992) ("'Proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred, the injury being the natural and probable consequence of the wrongful act") (internal quotation marks

as well as legal treatises.[6] Norfolk Southern admitted as much when it held up, as a model of "the traditional elements of negligence," the functionally indistinguishable instructions given as

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omitted); *Cella v. U.S.*, 825 F. Supp. 1383, 1399 (N.D. Ind. 1991) ("traditional common law standard regarding proximate cause" is "the defendant's "act or omission must be a cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred"); *Losey v. N. Am. Philips Consumer Elecs. Corp.*, 792 F.2d 58, 61 (6th Cir. 1986) ("a proximate cause is one which in a natural and continuous sequence unbroken by any new cause produces the injury either by itself or together with other negligence, or which may be described as negligence that is a substantial factor in causing the injury") (internal quotation marks omitted). *See generally Raab v. Utah Ry.*, 221 P.3d 219, 226 (Utah 2009) ("[i]n its most common usage, the term 'proximate cause' is equivalent to 'legal cause'") (citing Keeton, et al., *Prosser and Keeton on Torts* § 41, at 263 (5th ed. 1984)).

[6] *See, e.g.*, 1 Dan B. Dobbs, *The Law of Torts*, 453 (2001) ("With slight variations in the words, courts usually instruct juries or begin their own appellate discussions with a formal definition asserting that a proximate cause of an injury is one which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury."); 1 J.D. Lee & Barry Lindahl, *Modern Tort Law: Liability and Litigation* § 4.4 (2d ed. 2009) ("More recent cases also define proximate cause as any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred."); 57A Am. Jur. 2d *Negligence* § 411 ("One of the most widely quoted definitions is that the proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred") (footnotes omitted).

to Burlington Northern. Pet. 8; Pet. App. 70a-71a (incorporating, by reference, the previously given definition of "legal cause," and expressly equating it with "proximate cause").

There is no substantive difference between the instruction preferred by Norfolk Southern ("natural and probable consequence") and the one given to the jury below ("natural and continuous sequence"). Thus, the Court of Appeals was correct when, after careful analysis, it concluded:

> We find that the substance of these proposed instructions was covered in the trial court's instructions. Although the trial court's jury instruction did not use the term "proximate" cause, the court repeatedly emphasized that the plaintiff must prove that the railroad's negligence "in whole or in part, legally caused" the injury. The trial court instructed the jury that "[a] legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred."

Pet. App. 29a.

What Norfolk Southern is asking this Court to hold — in the case at bar, at least — is not merely that the FELA requires "traditional common law" proximate cause, but that it also mandates the use of the word "proximate" in the jury instructions.[7] The

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[7] Whatever differences there may be between the two concurring opinions in *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S.

petition, however, cites no legal authority for such a proposition.

To be sure, one portion of the instructions told the Jury that "even the slightest" negligence was sufficient. Norfolk Southern reads that instruction as referring to "even the slightest" causation, but this is a misreading. The instruction, reproduced and discussed below, p. 25, was a negligence instruction, not a causation instruction. What is more, even if it were a causation instruction, the case at bar is the kind of case that even Norfolk Southern agrees is subject to *Rogers*. In its brief on the merits in *Sorrell*, Norfolk Southern explained:

> *Rogers* held that, if there was evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury, the question of railroad liability must go to the jury even if it

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158 (2007), there is no reason to believe that there is any disagreement on this point:

> If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors. Nothing in today's opinion should encourage courts to use "proximate cause," or any term like it, in jury instructions. "[L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits."

Id. at 180 (Ginsburg, J., concurring) (citations omitted).

> played the slightest part in the injury—*i.e.*, if its causal contribution was slight relative to the employee's negligence.

Brief of Petitioner at 9, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (No. 05-746).

The case at bar was such a case. There was "evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury." Thus under Norfolk Southern's own view of *Rogers*, "even the slightest" was the proper causation standard here.

B. Norfolk Southern Neither Argued Nor Presented Evidence Below that, if the Jury Found It Negligent, There Was Insufficient Evidence of Causation.

Not only did the trial court give the jury a proximate cause instruction, but causation was never seriously contested at trial. What the parties disputed was negligence. Norfolk Southern denied that it was negligent, and argued that Mr. Jordan was negligent. Mr. Jordan denied that he was negligent, and argued that Norfolk Southern was negligent. Based on the evidence presented at trial, the cause of the accident was the negligence of one or the other. Neither party argued, or introduced evidence showing, that if it were negligent, such negligence was nevertheless not the legal cause of the accident. If Norfolk Southern was negligent (and the Jury, which was entitled to so find, did so find), then even under the strictest and most exacting

causation standard, that negligence was the proximate cause of Mr. Jordan's accident. There was nothing marginal or remote about the connection between Norfolk Southern's failure to use due care in light of the close clearances, poor communication, and poor lighting, on the one hand, and the risk that Mr. Jordan, forced to work in the Burlington Northern red zone, unseeing and unwarned, would be hit by a Burlington Northern train.

The reporters are filled with FELA cases in which causation is truly at issue. Time and time again, for example, a train will be forced to stop because of, say, a defect in the brakes. A crewman will get out, and he will be injured. Assuming that the brake defect was due to railroad negligence, was that negligence the legal cause of the injury? *See, e.g., Richards v. Consol. Rail Corp.*, 330 F.3d 428, 437 n.5 (6th Cir. 2003) (answering yes, at least where injury takes place while crewman is discharging job-related responsibilities; speculating no if, for example, "an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured").

The *Richards* fact pattern presents itself over and over, as the many cases cited in *Richards* attest.[8]

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[8] Another is *Raab v. Utah Ry. Co.*, 221 P.3d 219, 231 (Utah 2009) (finding proximate cause where plaintiff, a crewman on a train that stopped due to a defective brake, exited the train and eventually got hurt outside the train).

Indeed, according to amicus American Railroad Association, there is a continuous flow of cases in which the distinction between "traditional common law proximate cause" and "relaxed" or "even the slightest" causation would be decisive. Thus, to the extent that the causation standard is otherwise certworthy, the Court should await a case where causation actually was disputed at trial, and where the only causation instruction given was a *Rogers*-based instruction.

II. THE CONFLICT AMONG THE LOWER COURTS CLAIMED BY NORFOLK SOUTHERN IS NEITHER INTRACTABLE NOR DEEP.

Attempting once again to obtain this Court's review of the causation standard in FELA cases, *see Sorrell*, 549 U.S. at 164 (rejecting Norfolk Southern's effort to "smuggle" the causation issue into the case after the grant of certiorari), Norfolk Southern claims that there exists an intractable, "entrenched and acknowledged" conflict among the lower courts on FELA causation. It argues that while some courts rightly insist on proof of "traditional, common-law" proximate cause, others "treat *Rogers* as having eliminated the common-law requirement of proximate causation. . . ." Pet. 10-12.

There is less here than meets the eye. It is true that there is some disagreement on the exact meaning of *Rogers*. The federal courts of appeal all seem to read *Rogers* as making, in effect, the same broad statement that this Court made in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), to wit, "a relaxed standard of causation applies under

FELA."[9] A handful of courts have read *Rogers* more narrowly. *See, e.g., Marazzato v. Burlington*

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[9] *Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases"); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2nd Cir. 1999) ("a relaxed standard applies in FELA cases"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3rd Cir. 1991) ("In *Rogers*, the Court held that 'the test of a [FELA] jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury .' .... Similarly, in *Gallick*, the Court stated that there can be a jury question of causation when there is 'evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm'"); *Brown v. Baltimore & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority, for this most "lenient standard" of proof with respect to causation in an FELA action); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (unanimous, en banc) (Supreme Court had used the term "slightest" in *Rogers* "to describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 434 (6th Cir. 2003) (*Rogers* "adopted this relaxed [causation] standard in order to effectuate Congress' intent . . . 'to preserve the plaintiff's right to a jury trial'"); *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) ("It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action"); *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246 (8th Cir. 1996) (relaxed standard for causation); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363 (9th Cir. 1995) ("[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases"); *Summers v. Mo. Pac. R.R. System*, 132 F.3d 599, 607 (10th Cir. 1997) (quoting *Rogers* at length and concluding: "A jury instruction containing both the statutory language and the explanatory language of *Rogers* is certainly the clearest articulation of the appropriate causation standard");

Northern R. Co., 249 Mont. 487, 491, 817 P.2d 672, 674 (1991) ("*Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 228-30 (Utah 2009) (rejecting the argument that *Rogers* requires only "but for" causation; "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case"). And some, like the *Raab* court, misconceive what their sister courts have said about *Rogers*.[10]

Thibodeaux v. Tex. E. Transmission Corp., 548 F.2d 581, 587 n.12 (5th Cir. 1977) (pre-split, and thus binding in the 11th Cir.) ("Under the Jones Act, 46 U.S.C. § 688, the test for liability is whether 'employer negligence played any part, even the slightest, in producing the injury'" (quoting *Rogers*); *Brooks v. Wash. Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979) ("The test whether an F.E.L.A. case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought'") (quoting *Rogers*).

[10] As we have just noted, the bottom line in *Raab*, so far as it concerns *Rogers*, is that *Rogers* did not do away with all causation except "but for" causation. *Raab*, 221 P.3d 219, 228-30 ¶¶ 32, 35, 37. The *Raab* court contrasted its conclusion on this point with that of the Tenth Circuit in *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997). *Raab*, 221 P.3d at 228-29 ¶32 & n.35. But the holding in *Summers* was that that the plaintiff was *not* entitled to a *Rogers*-based instruction. *Summers*, 132 F.3d at 606. The instruction actually given used the statutory language ("in whole or in part"), and that, said the *Summers* Court, was sufficient; plaintiff had no right to insist on the addition of *Rogers*-based language ("played any part, no matter how small"). *Id.* This, of course, is inexplicable if the

But there is no conflict among the lower courts in practice: Norfolk Southern does not cite a single case in which the "relaxed" standard was rejected in favor of what Norfolk Southern calls "traditional common law proximate cause."[11] Even the *Raab* court applied

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Summers court thought that what *Rogers* "definitively abandoned" was proximate cause in the broad sense. In fact what the *Summers* court found "definitely abandoned" in *Rogers* was the practice of "analyz[ing] liability under the FELA *in terms of* proximate causation." *Id.* (emphasis supplied). Neither *Summers*, nor any other case so far as Mr. Jordan can tell, suggests that *Rogers* abandoned the concept that some "but for" causes are, for policy reasons, too remote to support liability.

[11] Several of the cases cited by Norfolk Southern as insisting on "proximate cause" cite *Rogers* as the standard by which "proximate cause" is measured. *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997), expressly declared that *Rogers* "established" "[t]he causation standard in FELA cases," and went on to quote *Rogers* "even the slightest" language. *Id.* at 482. The same is true of *Snipes v. Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), which quoted *Rogers* "even the slightest" language in order to show "[t]he liberality with which the Supreme Court has applied this test," *i.e.*, of FELA negligence and causation. Much the same is true of *Chapman v. Union Pac. R.R.*, 237 Neb. 617, 627, 467 N.W.2d 388, 395 (1991) ("An action brought under the Federal Employers' Liability Act must be submitted to a jury if the jury could reasonably find that "employer negligence played any part, even the slightest, in producing the injury ... for which damages are sought." *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957). Therefore, "the role of the jury is significantly greater in . . . FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir. 1980)").

what can only be described as a relaxed standard. In that case, a defective brake forced replacement of the lead locomotive, which in turn required plaintiff to enter a trailing locomotive to set the controls, where he hit his head on a low-hanging air conditioning unit. The court held that the jury was entitled to find that defective brake "was a proximate cause" of plaintiff's injury.[12] *Raab*, 221 P.3d at 222, 231.

There is, in short, not disagreement but essential unanimity: (1) the FELA plaintiff must prove more than "but for" causation; but (2) the standard by which this "more" is measured is, in comparison to what Norfolk Southern calls "traditional common law proximate cause," a "relaxed" standard. The controversy, such as it is, is entirely concerned with whether *Rogers* is among the many cases in which this Court has recognized the relaxed standard. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 180 n.1 (2007) (Ginsburg, J., concurring) ("I do not read Justice SOUTER's concurring opinion as taking a position on the appropriate causation standard as expressed in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969)"). And this purely academic question, so arcane and so unimportant that even Norfolk Southern did not

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[12] It bears repeating that what the *Raab* court said it was rejecting was not a relaxed causation standard, but the notion that only "but for" causation is required. *Raab*, 221 P.3d 219, 228-30 ¶¶ 32, 35, 37.

notice it when it petitioned for certiorari in *Sorrell*, simply does not merit this Court's review.

Finally, the supposed disagreement among the lower courts on which Norfolk Southern relies has persisted for quite a lengthy period of time. The first case that Norfolk Southern cites as applying the full proximate cause standard in a FELA case was decided in 1961, and the first case applying a "relaxed" proximate cause standard dates back to 1963. Pet. 12-13 & n.5. While the supposed disagreement dates back almost 50 years, Norfolk Southern has presented no basis for the Court to conclude any differences in emphasis or phraseology in the opinions have resulted in divergent outcomes, administrability problems in the lower courts, unfairly disparate results between different forums, or indeed any other adverse consequences. Norfolk Southern points to no cases that would have been decided differently had they been pending in a different state supreme court or federal circuit court. Because the supposed split in authority (assuming *arguendo* that it exists) has persisted for some 50 years with no negative consequences, review by this Court simply is not warranted.

III. ON THE MERITS, THE STANDARD FOR CAUSATION UNDER FELA IS RELAXED.

As explained above, the courts almost uniformly apply a relaxed standard of causation instead of what Norfolk Southern calls "traditional common law proximate cause." Norfolk Southern claims that a relaxed standard is inconsistent with this Court's cases, but it is not. There are numerous cases

(many decided before *Rogers*) in which this Court unmistakably applied a relaxed standard.[13] Nor is the relaxed standard inconsistent with the statute. Norfolk Southern finds in *Urie v. Thompson*, 337 U.S. 163 (1949), a hard and fast rule that FELA adopted then-existing common law except where otherwise stated, but the *Urie* Court looked, not merely to the common law, but also to another contemporaneously-enacted statute, *id.* at 184, "the spirit the statute [the FELA] contemplated for its administration and application," *id.* at 186, "the breadth of the statutory language, the Act's

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[13] *See, e.g., Tennant v. Peoria & Perkin Union Ry. Co.*, 321 U.S. 29 (1944) (railroad employee last seen walking out of view behind locomotive; his dismembered body later found strewn down the tracks; *held*: jury entitled to find that locomotive negligently backed over him, even though other scenarios were equally likely); *Webb v. Ill. Cent. R.R. Co.*, 352 U.S. 512 (1957) (railroad employee slipped on cinder; *held*: jury entitled to find that cinder came from railroad, despite the fact that there was no direct evidence to this effect, and multiple non-railroad sources were possible); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959) (Jones Act) (crewman washed overboard, subsequently manifested tuberculosis; *held*: jury entitled to find that dunking aggravated the T.B., despite fact that no medical witness so testified, and that medical witnesses testified to the opposite, and other potential causes were not negated. "The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation"); *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963) (employee bitten by mosquito; infection and amputation followed; *held*: jury entitled to find that mosquito in question was hatched and grew in one of the pools of water that railroad negligently allowed to stand on right-of-way). *See generally Lavender v. Kurn*, 327 U.S. 645, 651 (1946) (expressly approving a measure of "speculation and conjecture" in FELA cases).

humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question. . . ."[14] *Id.* at 181. *See also Coray v. S. Pac. Co.*, 335 U.S. 520 (1949) (irreconcilable with Norfolk Southern's theory that common law principles necessarily govern FELA causation), and *Carter v. Atlanta & St. A.B. Ry. Co.*, 338 U.S. 430 (1949) (same) (relying on *Coray*).

IV. NORFOLK SOUTHERN'S ARGUMENT ABOUT THE FELA NEGLIGENCE STANDARD IS NOT PROPERLY BEFORE THE COURT, AND IN ANY EVENT, THE JURY INSTRUCTIONS IN FACT REQUIRED WHAT NORFOLK SOUTHERN CALLS "TRADITIONAL" COMMON LAW NEGLIGENCE.

At the end of its Petition, Norfolk Southern turns to the question of whether FELA negligence, like

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[14] This last point is worth additional attention. Citing just four lower court cases, "[n]ot all of [which] could be sustained" under the railroads' interpretation, the *Urie* Court wrote: "We would be most hesitant to adopt a construction of 'injury' as used in this Act which would overrule the decisions last cited or seriously impair their authority." *Urie*, 337 U.S. at 186. The Court should be much more hesitant to adopt a construction of "in whole or in part" that would overrule, or seriously impair, decisions from every one of the courts of appeal. *See* n.19, *supra*.

FELA causation, is governed by a "relaxed" standard. Pet. 14. That question is not properly before the Court, because Norfolk Southern did not argue it in the trial court, and, in any event, the instruction given was a traditional common law negligence instruction.

The Jury instruction to which Norfolk Southern attempts to fasten this argument read in full as follows:

> DEFECT OR INSUFFICIENCY IN TRACKS OR EQUIPMENT
>
> The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.

Opp. App. 20a. The term "negligence" had previously been defined as "the failure to use ordinary or

reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence." *Id.* at 12a-13a.

Norfolk Southern asserts that these words "even the slightest" could have allowed the jury to find Norfolk Southern liable under a "slightest negligence" standard. Pet. 8-9. The Court should decline to review this issue.

First, Norfolk Southern failed to preserve the point below. At trial, Norfolk Southern complained continuously that the words "even the slightest," as used in this instruction, gave the wrong causation standard. It never once, however, suggested that the instruction affected the negligence standard. Indeed, the first suggestion to this effect came in its rebuttal brief in the Court of Appeals. Thus, Norfolk Southern errs when it says (Pet. 8) that it "reiterated its argument" about "slightest negligence" in the Court of Appeals; the first time it made that argument was in its Court of Appeals rebuttal brief. Even then, it did so only in passing, in half a dozen words unaccompanied by authority or reasoning. *See* Norfolk Southern's Rebuttal Brief in the Court of Appeals p. 12 ("The trial court incorrectly instructed the jury based upon the so-called 'watered down' version of causation and negligence"). So little, and so late, was Norfolk Southern's attempt to argue "slightest negligence" that the Court of Appeals saw the jury instruction issue as purely a causation issue. Pet. App. 9a ("Norfolk Southern raises the following issues on appeal, which we slightly reword: . . . .2.

Whether the trial court erred in instructing the jury concerning causation").

Indeed, Norfolk Southern's petition does not comply with this Court's Rule 14.1(g)(i), which requires that a petition state "when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The second problem with Norfolk Southern's argument is that it is simply incorrect. The instruction did not have any effect on the previously-defined negligence standard. What it told the Jury was that Mr. Jordan had to prove at least some negligence. Proof of a defect or insufficiency in tracks or equipment was not enough; there had to be, in addition, proof that "the defect or insufficiency is due to negligence, even the slightest, on the part of the employer [railroad]." Opp. App. 20a. In this context, the words "even the slightest" did no more than put FELA's pure comparative negligence scheme in operation. The jury was still required to find "negligence," and nothing in the instruction suggests that the standard for negligence was anything other than as previously defined, the failure to use "ordinary and reasonable care." Opp. App. 25a. Logically, in order to find that "negligence,

even the slightest," was present, the jury had to find that negligence was present.[15]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[15] Finally, and in any event, there is absolutely nothing to suggest that the instruction had any effect on the verdict. Where, as here, the verdict is a general verdict, and might have rested on something other than the supposedly erroneous instruction, the verdict must be affirmed unless it is shown that the supposed flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530-31 (2008) (internal quotation marks omitted). Norfolk Southern never has attempted to make, and never could make, such a showing.

APPENDIX

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT
MEMPHIS

NO. CT-004175-03

DIV. II

JURY DEMAND

THOMAS DAVID JORDAN,

Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE
RAILROAD COMPANY, A corporation;
and NORFOLK SOUTHERN RAILWAY
COMPANY, A corporation,

Defendant.

JURY CHARGE

Ladies and Gentlemen of the Jury:

You have now heard all of the evidence in this case, and after lunch you will hear the final arguments or summations of the lawyers for the parties. It is my duty to instruct you on the rules of law that you must follow and apply in arriving at your decision in this case, and you must follow the law as I instruct you.

As jurors, it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice or passion.

You are to consider all of my instructions as a whole and are to regard each in the light of all the others. If in these instructions any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others.

The order in which the instructions are given has no significance as to their relative importance.

Remember that any questions, objections, statements or arguments made by the lawyers during the trial are not evidence in this case; however, if the lawyers have stipulated or admitted any fact, you will regard that fact as being

conclusively proved as to the party or parties making the stipulation or admission.

If an objection to a question was sustained, you must not speculate as to what the answer might have been or the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; any such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

In reaching your verdict, you are to consider only the evidence in this case. You are not required to set aside your common knowledge, however, as you have the right to weigh the evidence in the light of your own observations, experiences and common sense.

The masculine form as used in these instructions applies equally to a female person or a corporation. The masculine form is simply used for convenience. Likewise, whenever the singular is used in these instructions, it may be taken equally to mean the plural if the context requires it.

The fact that a corporation is a party must not influence you in your deliberations or in your

verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards.

EVIDENCE

You are to decide this case only from the evidence which was presented at this trial. The evidence consists of :

1) the sworn testimony of the witnesses who have testified, both in person and by deposition;

2) the exhibits which were received and marked as evidence; and

3) any facts to which all the lawyers have agreed or stipulated.

There are two kinds of evidence - direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of a witness about what the witness personally observed.

Circumstantial evidence is indirect evidence that gives you clues about what happened. Circumstantial evidence is proof of a fact, or a group of facts, that causes you to conclude that another fact exists. It is for you to decide whether a fact has been proved by circumstantial evidence. If you base your decision upon circumstantial evidence, you must be convinced that the conclusion you reach is more probable than any other explanation.

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

WITNESSES

While you must consider all of the evidence which is admitted during the trial, this does not mean that you must accept all of the evidence as true or accurate.

You are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. You must consider all the evidence in the case. You may decide that the testimony of fewer witnesses on one side is more convincing than the testimony of more witnesses on the other side.

You are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you to think about the following questions. These are the same questions I mentioned in my preliminary instructions. I will review them for you.

1. Was the witness able to see, hear, or be aware of the things about which the witness testified?

2. How well was the witness able to recall and describe those things?

3. How long was the witness watching or listening?

4. Was the witness distracted in any way?

5. Did the witness have a good memory?

6. How did the witness look and act while testifying?

7. Was the witness making an honest effort to tell the truth, or did the witness evade questions?

8. Did the witness have any interest in the outcome of the case?

9. Did the witness have any motive, bias, or prejudice that would influence the witness's testimony?

10. How reasonable was the witness's testimony when you consider all of the evidence in the case?

11. Was the witness's testimony contradicted by what that witness has said or done at another time, by the testimony of other witnesses, or by other evidence?

12. Has there been evidence regarding the witness's intelligence, respectability, or reputation for truthfulness?

13. Has the witness's testimony been influenced by any promises, threats, or suggestions?

14. Did the witness admit that any part of the witness's testimony was not true?

There may be discrepancies or differences within a witness's testimony or between the testimony of different witnesses. This does not necessarily mean that a witness should be disbelieved. Sometimes when two people observe an event they will see or hear it differently. Sometimes a witness may have an innocent lapse of memory. Witnesses may testify honestly but simply may be wrong about what they thought they saw or remembered. You should consider whether a discrepancy relates to an important fact or only to an unimportant detail.

You may conclude that a witness deliberately lied about a fact that is important to your decision in the case. If so, you may reject everything that witness said. On the other hand, if you decide that the witness lied about some things but told the truth about others, you may accept the part you decide is true and you may reject the rest.

Usually witnesses are not permitted to testify as to opinions or conclusions. However, a witness who has scientific, technical, or other specialized knowledge, skill, experience, training, or education

may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as "expert witnesses."

You should determine the weight that should be given to each expert's opinion and resolve conflicts in the testimony of different expert witnesses. You should consider:

1. the education, qualifications, and experience of each witness; and

2. the credibility of each witness; and

3. the facts relied upon by the witness to support the opinion; and

4. the reasoning used by the witness to arrive at the opinion.

You should consider each expert opinion and give it the weight, if any, that you think it deserves. You are not required to accept the opinion of any expert.

In this case certain expert witnesses were asked to assume that certain facts were true and to give an opinion based upon those assumptions. This is called a hypothetical question. You must determine if any fact assumed by the witness has not been established by the evidence and the effect of that omission, if any, upon the value of the opinion.

THEORIES AND CONTENTIONS

Ladies and gentlemen, I am going to tell you the theories and contentions of the parties.

It is the theory and contention of the Plaintiff, Thomas David Jordan, that on November 13, 2002, he was employed by the Defendant, Norfolk Southern Railway Company, performing work in the furtherance of his duties by preparing a train for interchange at a location known in the local railroad world as "Broadway" at a point between "Tower 17" and "K C Junction." It is the Plaintiff's theory and contention that, while performing tasks required of him by his employer, he was struck by a train owned and operated by Defendant, Burlington Northern Santa Fe Railroad Company, which was passing on its adjacent track, resulting in severe permanent and disabling injuries to him.

It is the further theory and contention of the Plaintiff that both defendants were at fault and that their combined fault was the legal cause of the accident and resulting injuries, and for which he brings this suit to recover money damages from them.

Each of the defendants, Norfolk Southern Railway Company and Burlington Northern Santa Fe Railroad Company, categorically denies negligence under the circumstances then and there existing; and they each deny fault to any extent whatsoever.

Moreover, it is the theory and contention of each Defendant that if either of them should be found to be at fault, which they deny, then the Plaintiff himself was at fault and that his fault was the sole, direct, proximate and legal cause of the accident such that his right to recover is either barred thereby or diminished by his degree of fault.

Ladies and gentlemen, I have given you the theories and contentions of the parties so I can tell you where the law places the burden of proving the issues in this case.

It is now my duty to explain the law that applies to the specific facts of this case. If any of the lawyers in this case have told you that the law is different than what I will tell you, you will take the law as given to you by the Court. It is your duty and yours alone to determine what the facts are. After you determine what the facts are, it becomes your further duty to apply those facts to the law as given to you by the Court free from any bias, prejudice or sympathy one way or the other.

In this case plaintiff has sued two (2) defendants both of which are Railroads. Plaintiff has sued Norfolk Southern Railway Company which is his employer. He has also sued Burlington Northern Santa Fe Railroad Company which is not his employer. Since certain legal principles are different where the employee is suing his employer, and where he is suing someone other than his employer, I will segregate the instructions as follows:

1. I will first give you instructions dealing with general principles of law that apply equally to all parties.

2. I will next instruct you on the law that applies exclusively between plaintiff and his employer, the defendant, Norfolk Southern Railway Company.

3. I will then instruct you on the law that applies exclusively to the case of the plaintiff against the defendant Burlington Northern Santa Fe Railroad Company.

BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE

In this action, the Plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

A. That the Defendants were at fault;

B. The nature and extent of the Plaintiff's injuries and damages.

The Defendants, as an affirmative defense, claim that Plaintiff was at fault. The effect of this affirmative defense is that if proved, it will either prevent Plaintiff from recovering a judgment in this case or will reduce the recovery of Plaintiff.

The Defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the fault of Plaintiff.

The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence and the party having the burden of proving that issue has failed.

You must consider all the evidence on each issue. Your verdict must not be based upon mere speculation, guess, or conjecture.

Therefore in deciding this case you must determine the fault, if any, of each of the parties. If you find that more than one of the parties are at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault.

A party is at fault if you find by a preponderance of the evidence that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Fault, as defined, has two parts: Negligence and legal cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the

evidence. The amount of caution required of a person in the exercise of ordinary care depends upon the conditions apparent to him or that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence. Negligence will not be inferred from mere happening of an accident or occurrence of injury. It must be proved by direct or circumstantial evidence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

The second part of fault is legal cause. A legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

An act or omission which fails to prevent injury is a legal cause of the injury. There may be more than one legal cause of an injury.

To be a legal cause of an injury, there is no requirement that it be the only cause, the last act, or the one nearest to the injury, so long as it is a factor in producing the injury or damage.

The foreseeability requirement does not require the person guilty of negligence foresee the exact manner in which the injury takes place or the exact person who would be injured. It is enough that the person guilty of negligence could foresee, or through the exercise of reasonable care should have foreseen, the general manner in which the injury or damage occurred.

If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a legal cause of the injury or damage for which a claim was made, you have found that party to be at fault. As I said before the plaintiff has the burden to prove fault on behalf of the defendants. If the plaintiff fails to do so, you should find such defendant's fault to be zero. Likewise, the defendants have the burden to prove fault on behalf of the plaintiff. If the defendants fail to do so, you should find the plaintiff's fault to be zero. If you find both the plaintiff and one or both of the defendants to be at fault, you must then determine the percentage of fault chargeable to each of them.

You must also determine the total amount of damages sustained by the plaintiff. You must do so without reducing those damages by any percentage of fault you may have charged to any party. I will instruct you on the law of damages in a few minutes.

When you have made these decisions, as I have instructed you, it becomes my duty under the law to determine the amount of damages that you have awarded depending upon your finding as to fault, if any, with respect to each of the parties.

Your first obligation is to determine the fault, if any, of the parties. Next, you must assign a percentage of fault, if any, to each party. This percentage figure for each party may range from zero (0) percent to one hundred (100) percent. When the percentages of fault of all parties being compared are added together, the total must equal either 0% or 100%.

The parties to whom you may assign fault are:

Norfolk Southern Railway Company, A corporation

Burlington Northern Santa Fe Railroad Company, A corporation

Thomas David Jordan

If you find more than one party at fault, you must compare the fault of each party in order to apportion the fault among such parties.

You should weigh the respective contributions of each person to the occurrence in question and, considering the conduct of each as a whole, determine whether one made a larger contribution than the other(s), and if so, to what extent it exceeds that of the other(s).

The percentage of fault assigned to any person whose conduct may be compared should depend upon all of the circumstances of the case. The conduct of each person may make that person more or less at fault, depending upon all of the circumstances. In order to assist you in making this decision, you will be given a list of factors to consider. But the determination of fault on the part of any person and the determination of the relative percentages of fault, if any, is a matter for you alone to decide. You may use some, all, or none of the factors listed, and you may also consider any other factors that you find to be important under the facts and circumstances of this case.

1. Whose conduct more directly caused the injury to the plaintiff;

2. How reasonable was the person's conduct in confronting a risk; for example, did the person know of the risk or should the person have known of it;

3. Did the person fail to reasonably use an existing opportunity to avoid an injury to another;

4. Was there a sudden emergency requiring a hasty decision;

5. What was the significance of what the person was attempting to accomplish by the conduct.

By listing these factors, I do not mean to indicate that these are the only factors you could consider in apportioning fault between parties who are negligent, nor do I intend to suggest to you that any party is negligent. That is a matter entirely for you to decide and you should rely on your own common sense and ordinary experience in apportioning fault.

Your next obligation is to determine the full amount of damages, if any, sustained by:

Thomas David Jordan

In arriving at the full damage figure for a party, you should not consider in any way the question of fault. Do not reduce the damages by any percentage of fault.

The court will provide you with a special verdict form that will assist you in your duties.

LAW AS RELATES TO NORFOLK SOUTHERN RAILWAY COMPANY AS EMPLOYER OF THOMAS DAVID JORDAN, EMPLOYEE

Although there are two defendants in this lawsuit, it does not follow from that fact alone that if one is liable, both are liable. Each defendant is entitled to a fair consideration of his own defense, and is not being prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Please remember, all of my earlier instructions regarding fault of the parties including negligence and legal cause apply to this Defendant.

In this case plaintiff has sued two railroad defendants. Plaintiff's claim against his employer Norfolk Southern Railway Company is brought in plaintiff's capacity as an employee. The rights, duties and obligations between plaintiff employee and the employer Norfolk Southern Railway Company in this case are based upon a law of the United States commonly called the Federal Employers' Liability Act. This title does not mean that every employer is liable to every employee for every injury. The instructions I am about to give you apply exclusively between the plaintiff employee and the defendant employer Norfolk Southern Railway Company and have no application to plaintiff's claim

against the other defendant, Burlington Northern Santa Fe Railroad Company.

The plaintiff in this case claims damages for personal injuries, alleged to have been suffered as a result of negligence on the part of the Norfolk Southern Railway Company, his employer.

Section 1 of the Federal Employers' Liability Act as set forth in 45 U.S.C.A. §51, under which the plaintiff claims the right to recover damages in this action, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

It is established that, at the time and place alleged in the complaint, this defendant was a common carrier by railroad engaged in interstate commerce; that the plaintiff was then an employee of this defendant engaged in such commerce; and that the plaintiff's right, if any, to recover against Norfolk Southern Railway Company is governed by the provisions of the Federal Employers' Liability Act.

This is a negligence action. This means that before plaintiff can recover he must prove that his

injury resulted in whole or in part from the negligence or fault of this defendant.

A railroad is not an insurer of the safety of its employees, and negligence on the part of the railroad may not be presumed or inferred from mere proof of the happening of an accident.

No liability may be imposed upon the railroad unless the evidence disclosed (1) that it failed to exercise reasonable care under the circumstances, and (2) that any such failure in whole or in part legally caused the injuries of the plaintiff. As I said before, the burden is upon the plaintiff to prove both of the foregoing elements of his case by a preponderance of the evidence.

UNAVOIDABLE RISKS OR DANGERS

A railroad is not liable for those risks or dangers which it could not avoid in the observance of its duty of due care; in order to recover plaintiff is required to prove by a preponderance of the evidence that the defendant through its agents, servants or employees was guilty of negligence, which, in whole or in part, legally caused the accident and injury. You must determine the extent to which, if any, the risks and dangers involved in this case were unavoidable, if at all.

The Federal Employers' Liability Act also provides that in any action brought against any common carrier under or by virtue of the Act. Such employee shall not be held to assume any risk of his employment in any case where such injury resulted

in whole or in part from the negligence of the railroad. If you find that the Defendant, Norfolk Southern Railway Company was negligent and that such negligence was a legal cause of injury sustained by the Plaintiff, then even if the Plaintiff may have continued to work though he knew of the unsafe nature of the dangers existing, Plaintiff is entitled to recover damages.

DEFECT OR INSUFFICIENCY IN TRACKS OR EQUIPMENT

The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.

SAFER MANNER OF DOING WORK

It was the continuing duty of the defendant, as an employer, at the time and place in question, to

use ordinary care under the circumstances, in furnishing the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

DUTY REGARDING "TRACK, TOOLS, APPLIANCES, AND EQUIPMENT" AND "OPERATIONS"

The defendant has a duty to use ordinary care to provide its employees with reasonably safe and suitable tracks, tools, machinery and appliances with which to do their work, and which reasonably serve the purpose for which they were intended. As a general guideline for you, the test is not whether the appliances to be used are absolutely safe, but whether or not the employer has exercised reasonable care and diligence commensurate with the practical operation of the railroad to make them reasonably safe.

However, the employer is not required to furnish the latest, best and safest track, tools, machinery or appliances, or to discard standard tools, machinery track or appliances upon the discovery of later developments or better equipment or appliances. Neither is there any duty on the

employer to anticipate misuse of such equipment nor to guard against the consequences of misuse.

Ordinarily, an employee is not required to make an inspection of the tools and equipment furnished him by his employer. In the absence of knowledge to the contrary and in the absence of circumstances that caution him or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has furnished him with safe tools and appliances with which to perform his work, and he may rely and act on that assumption.

However, it is the duty of the employee to use ordinary care to discover open and obvious defects which render such tools or equipment dangerous to use in the performance of his work.

ACTUAL OR CONSTRUCTIVE NOTICE OF DEFECTIVE CONDITION

Before you may find a railroad liable for the injury of an employee resulting from a defective condition in equipment or his place of work, you must be satisfied that the railroad had either actual or constructive notice of the defective condition and that it had a reasonable opportunity to remove or repair the defect before the occurrence involved in this action.

Actual notice of a condition is said to exist when one has direct information of the condition. Constructive notice of a condition is said to exist when the condition is plainly visible or has existed

long enough that by the use of reasonable care it should have been discovered. The legal effect of constructive notice is the same as actual notice.

To find that a railroad had notice, actual or constructive, of a defective condition, you must be satisfied that such notice was received by an employee who was authorized to repair or remedy such condition, or by an employee having a duty to report such condition to one in authority or by a person who, in a reasonable delegation of responsibility, ought to have had such authority and duty.

DUTY OF PLAINTIFF TO EXERCISE REASONABLE CARE

It was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. In your consideration of this issue, you may consider the plaintiff's actions in the light of any conditions known to him. If you find that he did not exercise such care as a reasonably prudent person would under like circumstances, and that such conduct contributed, in whole or in part, to the plaintiff's injury, then he is negligent.

The plaintiff was also under a duty, constant and continuing, to exercise reasonable care to inform himself of the proper methods of doing his work and to minimize for himself the risks and hazards necessarily inherent in it and which the defendant could not remove by the exercise of ordinary care. It was his duty to exercise reasonable care to inform himself of his surroundings, of the character and

type of the instrumentalities with which he was engaged or with which he might come in contact and of any condition which might create any danger or hazard for him, including working in close clearance conditions on Broadway, and to use such care to avoid injury from it.

DUTY REGARDING "ORDINARY RISKS OR HAZARDS"

During all the time he was working, and at the time he was injured, the law imposed upon plaintiff the duty to exercise reasonable care for his safety. The defendant owed him no duty to exercise a higher degree of care for his safety than he owed to himself.

Plaintiff was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment not resulting from defendant's negligence and to protect himself from injury from such hazards however and whenever they might be encountered.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required, in the use of ordinary care, will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by law also increases as to both parties.

In determining whether or not the employer and employee to this cause discharged the duties imposed upon each of them in exercising reasonable care and diligence, it is proper for you to take into consideration the plaintiff's familiarity with the place in which he customarily worked, and his familiarity with the nature of the work which is customarily performed in that place by other employees.

All work on a railroad involves some danger, but it has to be done and the dangers involved do not involve liability provided the railroad takes reasonable precautions consistent with the conduct of the business.

You have been instructed that plaintiff was under a duty to exercise reasonable care for his own safety. In your consideration of this issue, you may consider plaintiffs action's in the light of any condition known to him (or conditions which should have been known to him in the exercise of ordinary care.)

The plaintiff was under a duty to observe obvious and apparent conditions. Every person owes to himself the duty to see what is plainly to be seen by the ordinary use of his senses and, if clearly visible, it is deemed, in law, to have been seen. If you find from the evidence in this case, that the condition of which the plaintiff complains was one which a person using ordinary and reasonable care could have discovered and avoided, then you may find that person to have been negligent.

COMPANY RULES AND REGULATIONS

Reference has been made in this case to certain rules adopted by the railroad for the safety of its employees. These rules were not admitted into evidence as legal standards of duty but as evidence of the degree of reasonable care to be exercised on the part of either the plaintiff or the defendant in situations to which the rules apply.

LAW AS RELATES TO BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY

I have previously instructed you upon the law as applies to Norfolk Southern Railway Company, as the employer of the plaintiff. I will now instruct you on the law as applies to the defendant Burlington Northern Santa Fe Railroad Company.

As I have explained before, the Plaintiff Thomas David Jordan is not an employee of Defendant Burlington Northern and Santa Fe Railway Company. As such, the Federal Employers' Liability Act has no application to Defendant Burlington Northern and Santa Fe Railway Company and Burlington Northern and Santa Fe Railway Company has no duty to provide plaintiff a reasonably safe place to work. The plaintiff's theory against Burlington Northern Santa Fe is under common law negligence.

A claim for negligence requires the following elements:

(1) a duty of care owed by the defendant to the plaintiff;

(2) conduct by the defendant falling below the standard of care amounting to a breach of that duty;

(3) an injury or loss;

(4) causation in fact; and

(5) proximate or legal cause.

If you find from the greater weight or preponderance of the evidence that the headlight on the Burlington Northern train was not shining at all, as alleged, then you have found Burlington Northern was negligent.

Similarly, if you find from the greater weight or preponderance of the evidence under the circumstances then and there existing that Burlington Northern had a duty to engage either the bell, or horn, or both, by its failure to do so, then you have found that Burlington Northern was negligent.

In determining whether Burlington Northern was at fault, you must then proceed to determine whether any negligence that you may have found on the part of Burlington Northern was a legal cause of the accident in question. In doing so you must follow all of my earlier instructions regarding legal cause.

DAMAGES

If you find that the Plaintiff is entitled to recover from the Defendant, then you should award an amount to the Plaintiff for each of the following elements of claimed loss or harm, provided you find that it was or will be suffered by him/her and it was legally caused by the fault of the defendant.

First you should determine what, if any, reasonable compensation Plaintiff is entitled to recover for the following:

1. Past physical pain and suffering, including loss of capacity for the enjoyment of life,

2. Permanent impairment,

3. Future physical pain and suffering, including future loss of capacity for the enjoyment of life.

These are often referred to as "non-economic" damages.

No definite standard or method of calculation is prescribed by law by which to fix compensation for such injuries; nor is the opinion of any witness required as to the amount. In making such calculation, you shall exercise your authority with calm and sensible judgment and the damages you fix shall be just and reasonable in the light of the evidence.

You should also consider what, if any, "economic" damages were or will be suffered. These include:

1. the reasonable value of medical care, services, and supplies reasonably required in the future treatment of the Plaintiff, and

2. the value of earning capacity lost in the past and that will be reasonably certain to be lost in the future as a result of the injury in question.

In determining what, if any, award should be made for lost earning capacity, you should consider any evidence of Plaintiff's earning capacity, including, but not limited to, the following: the Plaintiff's health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment. You should also consider the Plaintiff's physical capacity to perform work at the time of injury and thereafter. It is not the loss of time or actual earnings that may be recovered, but the loss of the ability to earn.

You are not permitted to award speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain.

However, you should compensate a Plaintiff for any loss or harm which is reasonably certain to be suffered as a legal result of the injury in question.

If you find from a preponderance of the evidence that the plaintiff has and will with

reasonable certainty in the future experience pain and suffering as a result of his injuries, he is entitled to be fairly and reasonably compensated therefor, but such compensation may not be determined by you based upon any hourly, daily, monthly or other unit of time measurement for there is no mathematical formula by which factors of this kind can be fairly determined.

Your award, if any, will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award, if any.

Thus, in the event that you should find that plaintiff is entitled to an award of damages in this case for loss of wages and/or future earning capacity, you should take into consideration such loss after income tax; that is, you should determine the actual or net amount that plaintiff has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes, and you should award plaintiff only what he actually has lost or will lose, that is, his earnings less any such tax that would be due on them. Further, in consideration of such loss and to the extent there is evidence concerning such, you may take into consideration the following factors: the number of years the plaintiff may be expected to live and work; his wages and fringe benefits, his likely wage increases due to promotions, seniority or experience raises, merit raises, and the effect of inflation or deflation of his future wages.

Since money can earn interest, an amount to cover a future loss of earnings is more valuable to

plaintiff if received today than if the same amount is received in the future. Therefore, if you decide to award plaintiff an amount for future loss of earning capacity, it must be discounted to present value by a factor equal to an after tax rate of return on a risk-free investment according to accepted economic principles. Although you are not bound to accept the conclusions or opinions of the economists who testified during the trial, I instruct you that their testimony on discount was based on acceptable economic principles. However, it is for you and you alone to determine the weight, faith and credit to be given to any witness.

In the event you find that plaintiff is entitled to receive an award for physical disability, mental and/or physical pain and suffering, past, present, and future, I instruct you that such an award is not subject to income tax, and any amount which you award on this basis will not be taxed by the federal or state government. You are not to consider the effect of tax on said sum because no tax will be due on it. [Lunch Break]

CONCLUDING INSTRUCTIONS

I have given you various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you decide are the facts. My instructions on any subject, including instructions on damages, must not be taken by you to indicate my opinion of the facts you should find or the verdict you should return.

Your attitude and conduct at the beginning of your deliberations are very important. It is rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. If you were to do that, it might be difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide that you might be wrong. Please remember that you are not advocates for one party or another. You are the judges of the facts in this case.

Each of you should deliberate and vote on each issue to be decided.

Before you return a verdict to the Court, however, each of you must agree on it in its final and complete form so that each of you will be able to state truthfully that the verdict is his or hers. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is not correct. But do not surrender your honest conviction as to the weight or effect of evidence solely

because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The law forbids you to determine any issue in this case by chance. Thus, if you decide that a party is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take each juror's independent estimate of the amount to be awarded, to total those amounts, to divide the total by twelve and to make that resulting average the amount you award.

Some of you may have taken notes during the trial. Once you retire to the jury room you may refer to your notes, but only to refresh your own memory of the witnesses' testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your own individual memory as to what a witness did or did not say.

In discussing the testimony, you may not read your notes to your fellow jurors or otherwise tell them what you have written. You should never use your notes to persuade or influence other jurors. Your notes are not evidence. Your notes should not be considered as a transcript of the testimony and should carry no more weight than the unrecorded recollection of another juror.

If, during your deliberations, you would like to review the exhibits, then please knock on the door of the jury room and ask my court officer to bring them to you.

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer.

I will read your question and I may call you back into the courtroom to try to help you. Please understand that I may only answer questions about the law and cannot answer questions about the evidence. [Lawyers to Bench/Excuse Mrs. Peyton]

You will now retire and select one of your number to act as presiding juror who will preside over your deliberations. As soon as all twelve of you have agreed upon a verdict, your presiding juror will complete and sign the Verdict Form and you will knock on the jury deliberation room door to advise one of my court officers that you have agreed on a verdict.

Remember that you may deliberate only when all of you are present in the jury room. You may not resume your deliberations after any breaks until all of you have returned to the jury room.

VERDICT FORM

We, the jury, make the following answers to the questions submitted by the Court:

1. **Was Defendant, Norfolk Southern Railway Company negligent under the Court's instructions?**

YES _____ NO _____

2. **Was Defendant, Burlington Northern Santa Fe Railroad Company negligent under the Court's instructions:**

(a) **by turning the headlight off?**

YES _____ NO _____

(b) by not engaging the bell or horn or both?

YES _____ NO _____

(If your answers to Questions 1 and 2 are all "no," sign the verdict form and return it to the courtroom. If you answered "yes" to any question in 1 or 2 above, proceed to Question 3, 4 and 5.)

3. **Was Plaintiff, Thomas David Jordan, negligent under the Court's instructions?**

YES _____ NO _____

4. Considering your answers to Questions 1, 2 and 3, please state in percentage terms the relative fault, if any, to be attributed to the parties under the Court's instructions.

Defendant, Norfolk Southern Railway Company

_____% (0-100%)

Defendant, Burlington Northern Santa Fe Railroad Company

_____% (0-100%)

Plaintiff, Thomas David Jordan

_____% (0-100%)

TOTAL: 100%

5. Without considering the percentage of fault found in Question 4, what total amount of damages do you find to be sustained by Plaintiff, Thomas David Jordan?

$_____

_____ _____

Date Presiding Juror